

June 5, 2007

ENVIRONMENTAL COMMITTEE/BENTON COUNTY PLANNING BOARD REPORT

An Environmental Committee/Benton County Planning Board meeting was held on Tuesday, June 5, 2007 at 5:00 p.m. in the County Administration Building, Quorum Court Meeting Room, 215 East Central, Bentonville, Arkansas

Committee Members Present: Brown, Hubbard, Moore, Schindler, Winscott, Wozniak

Others Present: Planning Director Ashley Pope

Media: Jennifer Turner, Daily Record; Scarlet Simms, Morning News

JP Jim Wozniak called the meeting to order at 5:00 p.m.

MINUTES:

JP Moore made motion to approve the minutes of the February 6, 2007 meeting as distributed, seconded by JP Glass. Motion passed by unanimous show of hands vote.

PUBLIC COMMENTS:

Don Day stated that he wanted to compliment County Attorney Robin Green on her comments regarding the nuisance abatement ordinance, and agreed that there are some concerns about the definitions. He said he still wished that they would consider a permanent 5-person appeals board patterned after state requirements instead of the 3-person board of Justices of the Peace appointed by the County Judge. He said it will not be easy to administer the ordinance, so it would make more sense to have a larger, permanent board that would eventually gain the experience to handle the issues. He said the constitution does not guarantee protection from things that annoy us, and he is afraid that proponents of any ordinance that contains the word nuisance may have the mistaken idea that it will allow them to make over their neighborhood in a fashion that suits them and eliminate anyone who does not conform to their will. He said the committee has become more deliberate in considering the consequences of their actions, and he applauds them for that. He thanked the committee for rejecting some recent proposals that would have been disastrous if adopted. He said that he has distributed copies of House Bill 1413, which enables counties to take care of some of the things that are being discussed in the nuisance ordinance.

JP Wozniak asked if Don Day would be willing to serve on the 5-person committee. Don Day replied that he would.

Tom Jones stated that he is president of the Beaver Shores Property Owners' Association, and they have over 700 property owners who are concerned about decreased property values due to yards full of junked cars and appliances. He said they are not looking to perform a neighborhood build-over, but they are asking that the nuisance ordinance be passed because they need some help out in the county. He said they do not want people to have the opinion that if you move out of the city of Rogers, then you can do whatever you want to on your property without regard to your neighbors. He distributed copies of pictures that illustrate some of the areas they are concerned with.

OLD BUSINESS:

1. Proposed Nuisance Abatement Ordinance – County Attorney Comments

The committee discussed the comments and suggestions made by County Attorney Robin Green in a document previously distributed. JP Wozniak stated that if the suggestions are acceptable to the committee, the County Attorney will need to rewrite the ordinance to include the changes and the ordinance will then come back to the Environmental Committee. If the changes are significant it will have to go to the Planning Board for another hearing, and from there it can go straight to the Committee of 13. JP Moore stated that his impression from the County Attorney was that if they only incorporated the changes she suggested that the ordinance would not be altered enough to require another public hearing. JP Moore stated that he would be in favor of reviewing the document in toto after the changes are made, because it is hard to tell from the list of suggestions how the document will read after they are made. JP Winscott said he took a copy of the ordinance and incorporated the changes as suggested by the County Attorney, so he is not sure why she has to re-write the entire document. JP Wozniak stated that she has to defend the ordinance, so she is the one that needs to write it.

The committee went through the list of suggested changes, which included changing “health, safety, *and* public welfare” to “health, safety, *or* public welfare” wherever the phrase appears in the ordinance, defining “responsible party”, and some changes in the owner abatement and summary abatement procedures. JP Wozniak stated that none of the changes are major, so it may be correct that the ordinance will not need to go to the Planning Board for a public hearing.

JP Hubbard asked who a property owner would appeal to if they wanted to prove they were financially unable to afford abatement on their property. JP Wozniak stated that he assumed it would be the same appeal board that currently deals with Planning Board appeals.

JP Wozniak stated that he would ask Robin Green about Don Day’s request to change the appeal board from 3 Justices of the Peace to a permanent group of 5 people chosen from the public, including Mr. Day. JP Moore said the bottom line is that is the County Judge’s call. JP Wozniak stated that he thought that was correct, but he would check with Robin Green. He asked if everyone on the committee agreed with that change. JP Schindler asked if the ordinance will come back to the Environmental Committee, and stated that as of right now they are looking at January of 2008 before this long-awaited ordinance will take effect. He requested that they ask the County Attorney to move as quickly as she can, so that the committee can move as quickly as the public deserves. JP Hubbard stated that if she can review it in two weeks, they can call another Environmental meeting. He said it appears that most of the research has been done, although it does not look like it should have taken 60 days.

JP Winscott stated that if a person has 10 junked cars in his yard, and obtains license and registration for them all, he can escape this ordinance, and it might be cheaper for him to do that than clean up the cars. JP Moore pointed out that he would also have to pay for insurance. JP Winscott stated that he could get insurance and then cancel it the next month like a lot of other people do. JP Wozniak stated that the state is working on ways to notify law enforcement when that happens, and there are ways around everything that the Quorum Court can do. JP Winscott stated that the other way to get out of it is to purchase 10 acres. JP Wozniak stated that if they own 10 acres they have enough property for the nuisance to be out of sight.

JP Moore stated that there is a junkyard ordinance on the books that requires fencing around junked cars in yards, and it is not being enforced by the Environmental Department. JP Hubbard stated that they need to keep in mind that they are passing ordinances for the unincorporated area, not a town

or city, so they cannot write an ordinance like a city would. He said these people live in the country and we don't want to lock them down to a bunch of ordinances like they have in town. JP Winscott stated that he just wanted the committee to be aware of these two things.

JP Moore stated that it is a shame that they have to treat the entire county the same, because there are areas of the county where no one cares if there are old cars piled up, and there are other areas which are essentially residential neighborhoods such as Beaver Shores, where it makes a great deal of difference.

Don Day asked if anyone has seen House Bill 1413 which empowers counties to compel property owners to remove junk in unincorporated areas of the county. He said if someone has a problem in the county right now, they should use that state law instead of waiting for the nuisance ordinance to pass. JP Wozniak stated that he would mention it to Robin Green, because it would solve most of the problems they are talking about in the ordinance, except buildings. JP Moore stated that Don Day has a point that the Quorum Court could adopt House Bill 1413 like they did the Building Codes.

JP Winscott stated that the Environmental Director has said that he cannot enforce state laws. JP Wozniak stated it has to be adopted at the county level. Planning Director Ashley Pope stated that her understanding was that Environmental Director Jim Ecker stated that state laws do not allow him to write citations.

JP Winscott made motion to send the proposed nuisance abatement ordinance to Robin Green to add her revisions, answer whether or not they can expand the appeal board to 5 citizens instead of 3 Justices of the Peace, and let them know what would be necessary to adopt House Bill 1413 on the county level, seconded by JP Hubbard. JP Schindler stated that he cannot vote for the ordinance if the appeal board is changed. JP Wozniak stated that was his prerogative. JP Moore stated that it is actually the County Judge's prerogative. JP Schindler stated that the concept has been that the Justices of the Peace will serve as the appeals board, as they do in other situations, and they are now proposing to expand that to the public. JP Wozniak stated that it is not set in stone that it has to be Quorum Court members. JP Schindler stated that it has been discussed on many occasions, and he feels it is the proper way to do it. He said that they are the elected officials and the ones responsible for the ordinance. He added that it was unfortunate that they have put him in the position after all this time that he cannot support the ordinance.

JP Moore stated that he wanted to clarify something. He said that anything to do with any committees that they put in the ordinance is advisory only, and the County Judge has complete and total authority to create, devise, and populate any committee he wants. He said the Quorum Court has absolutely no authority to dictate to the County Judge how or in what form the committee will take as far as the appeal committee. Ashley Pope stated that the proposed ordinance defines this particular appeal board. JP Wozniak stated that if they kick that portion out, then the County Judge can do whatever he wants. JP Hubbard stated that the County Judge cannot change the number of members that are specified in the ordinance. JP Moore stated that he can. Ashley Pope stated that it will have to be the number that is spelled out in the ordinance. JP Moore stated that he thought there are some Attorney General opinions that disagree. He said if the ordinance exceeds the Quorum Court's authority, then it is null and void. JP Wozniak stated that is what the County Attorney is for, so they will leave it up to her. JP Schindler stated that if they change the appeal board from 3 Justices of the Peace to 5 members of the public, then that would be a significant change that will send it back to the Planning Board for a Public Hearing. JP Wozniak said that was possible, but again that would be the decision of the County Attorney, because she is the one who has to build it and defend it, and she can tell them which way they need to go. He said she will be

the County Attorney for at least another 18 months, and she is the one that has to be satisfied with it. He said it will be difficult enough without putting her between a rock and a hard place right off the bat.

JP Winscott asked JP Schindler if he could support the ordinance if it spelled out that the appeal board be made up of 3 Justices of the Peace and 2 citizens at large. JP Schindler stated that he would not. JP Wozniak asked if he could support 5 Justices of the Peace. JP Schindler stated that he is concerned that they are getting back to the slow-down route with additional public hearings and appearances before committee after committee. JP Wozniak stated that it does not change the ordinance at all. JP Schindler stated that the ordinance they have been looking at for months states that the appeal board will be made up of 3 Justices of the Peace, and the County Attorney did not question it. He said that is the version that went through the Planning Board, and should be the final version that they are going to work on.

Motion passed 5 votes for, 1 against. (JP Schindler)

JP Hubbard asked if the bill mentioned by Don Day was actually enacted and they county wanted to adopt it as an ordinance, would they have to bring it before the Environmental Committee, or could it go straight to the Committee of 13. JP Wozniak stated that it would have to start somewhere, and that would most likely be the Environmental Committee. JP Hubbard asked if it could be brought to the Committee of 13 by a Justice of the Peace. JP Wozniak stated that was correct, that any JP can bring up anything at a Committee of 13 meeting. JP Moore asked if anyone on the committee had any objections to bringing the bill straight to the Committee of 13. JP Wozniak stated that he would ask Robin Green about it. JP Moore stated that they will also need to get input from Environmental Director Jim Ecker.

NEW BUSINESS:

1. Flood Plain Insurance Program – Planning Director Ashley Pope

Planning Director Ashley Pope explained the history of the National Flood Insurance Program and stated that Benton County has been a member since 1989. She said that the Federal government agrees to back flood insurance policies if local communities will adopt regulations for development within the flood zone, and people who build within flood zones cannot get flood insurance without it. She said the last study done in Benton County was in 2000, and since that time FEMA has undergone a map modernization. She said that proper notice was given for a 90-day public comment period on those maps, and the next step is for the county to adopt the ordinance. She said the model ordinance provided by FEMA is very similar to the current one, and can be modified depending on how stringent they want the regulations to be.

The committee discussed the availability of flood insurance to people who build within a 100-year flood zone. Ashley Pope stated that unless the community in which they build, either a city or county, is a member of the program, they cannot buy flood insurance. JP Hubbard stated that he thought they could if they were above the base flood elevation. Ashley Pope stated that they cannot. JP Hubbard stated they can buy homeowner's insurance against floods. Ashley Pope stated that homeowner's insurance will not cover floods. JP Hubbard stated that he has always been under the assumption that once the base flood elevation is determined and the house has been certified to be above that elevation, the owner could buy any insurance they want. He said that this would only help people who build below the Base Flood Elevation. Ashley Pope stated that it would help anyone who is in the flood zone, that even if a house is elevated above the Base Flood Elevation, the lender will require flood insurance. JP Hubbard stated that he has built houses in the 100-year

flood zone, and they have been able to obtain insurance. Ashley Pope stated that is because Benton County was already a member of the program.

Ashley Pope stated that since the maps have been updated it is necessary to pass a new ordinance. JP Wozniak asked if this is like an amendment to an ordinance that is already on the books, and not creating a new one from scratch. Ashley Pope stated that was correct. She added that the model ordinance sent to them is very similar to the one they have now, and they can modify it as long as they stay within the minimum requirements of FEMA.

JP Winscott asked if the Planning Board will approve a building in a 25- or 50- year flood zone. Ashley Pope stated that they would. JP Winscott asked if the person could then get flood insurance. Ashley Pope stated that they could because Benton County is a member of the National Flood Insurance Program. She said the insurance company will use actuarial tables to determine the amount of risk involved, and all they are protecting essentially is the 100-year flood zone. JP Hubbard stated that most mortgage companies also have their own requirements, and a home builder has to hire an engineer to certify the Base Flood Elevation, and the maps that Ashley Pope is referring to are not very detailed. Ashley Pope stated that some areas have detailed studies and some do not. JP Hubbard stated that is very rare, and most of them require a surveyor or engineer to traverse 5 miles to find a Base Flood Elevation.

The committee went through a code and ordinance that were furnished by the Arkansas Natural Resource Commission and previously distributed to the committee. Ashley Pope stated that the ordinance is pretty typical, and adopts the regulations by reference. She said that since the previous ordinance was codified, the ordinance they are looking at will have to be modified to amend the Benton County Code of Ordinances. She said the ordinance requires an appeal board, which is currently the Planning Board.

The committee discussed the Flood Damage Code. Ashley Pope recommended against variances. JP Wozniak stated that it would be hard to win in court if someone wanted to build in a location where houses are already located. The committee made no changes in the provision for variances.

JP Winscott asked how a person is made aware of a home's location in a flood plain. Ashley Pope stated that it is required on the Arkansas property disclosure form that is provided by a seller.

Ashley Pope pointed out that throughout the Code, it is suggested that they require the floor of a structure to be two feet above the Base Flood Elevation, and a non-residential structure be allowed below the Base Flood Elevation if it is flood-proofed up to a height of three feet above the Base Flood Elevation. She said the current ordinance only requires one foot above the Base Flood Elevation, with flood-proofing required only to the Base Flood Elevation for non-residential structures. She said the limits in the model ordinance are more stringent regulations than they are currently enforcing, but they have been recommended by the State of Arkansas.

Ashley Pope stated that other counties have adopted the ordinance, and had the option of going lower than the recommended levels, but she would not recommend that, in case as JP Hubbard pointed out, the map might not be accurate. JP Hubbard stated that regardless, the homeowner has to hire an engineer to certify the Base Flood Elevation. Ashley Pope stated that it still has to be approved by the Planning Department. JP Hubbard asked what better authority could there be other than an engineer. Ashley Pope said that as the governing entity, it is ultimately Benton County's responsibility, and therefore the responsibility of her department, to certify the Base Flood Elevation. JP Hubbard asked if the Planning Department has procedures in place that surveyors are required to follow to determine the Base Flood Elevation. Ashley Pope stated that they do. JP Hubbard stated that he did not think they needed to be more stringent than the surrounding cities, who mostly set the level at one foot above the Base Flood Elevation, which is still one foot above

the minimum set by FEMA. Ashley Pope stated that if they choose more stringent regulations, they can receive a more favorable rating from the Community Rating System, which will allow an additional discount for flood insurance. JP Wincott asked JP Hubbard how much additional cost is added to a home if the floor is required to be an additional one foot above the Base Flood Elevation. JP Hubbard stated that it would cost an additional \$1,200 to \$1,500. JP Wincott asked if that was his main concern for wanting to stay at the current regulation of 1 foot above the Base Flood Elevation. JP Hubbard stated that it is, because some people do not have a choice because they already own the land and he would like to see the costs kept down for homeowners and builders. He said there are some instances where only a home's overhang is in the flood zone, and the entire house has to be brought up to these regulations. Ashley Pope stated that would depend on who is looking at it— whether it's a mortgage company, or a loan officer, or a flood plain administrator. JP Hubbard stated that he has had several experiences with this, especially on small lots. He added that the minimum requirement is zero, and we are currently at 1 foot. He said he is aware of some incorporated areas that are at two feet, but most are 1 foot above.

After more discussion the committee voted to set all required levels at 2 feet above the Base Flood Elevation, including the flood-proofing requirement for non-residential structures.

The committee discussed regulation of floodways. Ashley Pope stated that she would recommend prohibiting development of any kind in a regulatory floodway unless a variance is granted, because a no-rise certification that is allowed by FEMA costs a minimum of \$15,000 to \$20,000. JP Wozniak suggested going with Ashley Pope's recommendation. JP Moore asked JP Hubbard what he thought about it. JP Hubbard agreed.

JP Hubbard asked what they are trying to accomplish with the ordinance tonight. JP Wozniak stated that they need to make the modifications, then send it to the County Attorney so they can begin the process of getting it adopted because they are facing a deadline. Ashley Pope stated that her intent was to discuss it today and get their opinions, then put the document in a more final form without all of the blanks, and then bring it back to the Environmental Committee or the Committee of 13. JP Hubbard stated that he would like to look at it again, no matter what they decide tonight. He said he did not know if the other committee members had taken it to their constituents or not, but his constituents are engineers and he has not received any feedback from them yet. He said he is not sure what the impact is. He said that what most of them do not realize is that the FEMA maps are a joke for the unincorporated areas. He said that some of it is data taken from planes that flew over in the 1950's.

Ashley Pope stated that she would be happy to come back in July, because they have until September to pass the ordinance, and if they agree to the emergency clause that will not be a problem. She said she agreed that the information on the maps is not always correct, and it sometimes takes several skilled and educated people to figure it out. She said sometimes a portion of the land can look as though it is in a floodplain, but the elevation is so high that there is no way it could flood, such as a house on a ridgeline. She added that the new maps have been delivered digitally, so it is much easier to locate a property using the county's GIS system.

The committee approved prohibiting development in a floodway unless a variance is granted, prohibiting the placement of mobile homes in a floodway, and the addition of language to the definition of "Development" that will protect farmers from having to get permits for a fence or activities such as grazing. Ashley Pope stated that she is working with Farm Bureau to make sure that the language is adequate.

JP Hubbard stated that the Planning Board is referred to frequently in the ordinance, so he is not sure why this committee is discussing it. JP Wozniak stated that they have to adopt an ordinance to

have regulations. Ashley Pope stated that the Planning Board's only purpose in this case is to serve as an appeal board. JP Hubbard stated that they sent the nuisance ordinance to the Planning Board for their opinion. JP Wozniak stated that he is uncertain of the legalities of why the nuisance ordinance needed to go to the Planning Board, but certain things have to go to them and certain things do not. JP Wozniak stated that the Planning Board is their forum for a public hearing, because they cannot have their own public hearing. Ashley Pope stated that it does not require a local public hearing, that FEMA published notice requesting public comments in the local newspapers. JP Hubbard stated that he felt the Planning Board is more qualified to comment on stuff like this than the JPs. Ashley Pope stated that the ordinance is not much different from the one that is currently in place, and she did not think that the Planning Board would have much comment because they are not involved in the daily granting of permits. She pointed out that the Planning Board is referred to only in the case of a variance or an appeal, because the applications either meet the requirements of the ordinance or they do not.

JP Hubbard asked for information regarding how much of a discount residents would receive on flood insurance if they adopted the more stringent requirement of 2 feet versus one foot above the Base Flood Elevation. Ashley Pope stated that she would research it. JP Hubbard stated that more stringent requirements are going to cost people more money, so he would like to know how much cheaper the flood insurance would be.

OTHER BUSINESS:

JP Hubbard asked if the other JPs have received a letter from Doug Timmons regarding the requirement of a completion bond for the Grandview Condominium project. He said he is not aware of the county ever requiring a completion bond from a developer, and asked if that is going to be the new standard. Ashley Pope stated that it was a condition of approval which the county may add to proposed projects. She said it is not standard, but this was an unusual situation. She said she would be happy to discuss it more fully at another time. JP Hubbard stated that he does not see how there would be any cost to the taxpayers if the project is not completed, because the county would not have to complete it. Ashley Pope stated that some people fear that the development will fail during construction and become an eyesore on Beaver Lake, so the purpose of the completion bond will be to cover the cost if the county has to either clean up the site or finish the building. JP Winscott asked if the county actually required a completion bond of the developer. Ashley Pope stated that they did, although there is some disagreement as to whether it was required of the contractor or the developer. She stated that the developer is being required to put up the completion bond, and the county will issue the building permit when they receive notification from the County Attorney that she is satisfied that the bond is sufficient to meet the intent of the Planning Board. JP Hubbard asked if the developer is planning to appeal, to force the contractor to put it up, because that is the industry standard. Ashley Pope stated that the only thing they could do would be to file a lawsuit, because it is a condition of approval. JP Winscott stated that it is not that unusual for the Planning Board to go above the norm for conditions of approval. JP Hubbard stated in the past the Planning Board only required a completion bond of the developer if the project was near completion but was lacking in some things like asphalt, and the developer wanted to begin selling lots.

After motion and second the meeting was adjourned at 7:20 p.m.